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No. 84-497

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED SEPTEMBER 27, 1984
PROBABLE JURISDICTION NOTED NOVEMBER 26, 1984

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PLAINTIFFS

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC.
Old Ridgebury Road, Sec. P-3
Danbury, Connecticut 06817

ABBOTT LABORATORIES
Abbott Park
North Chicago, Illinois 60064

CIBA-GEIGY CORPORATION
444 Sawmill River Road
Ardsley, New York 10502

E.I. DUPONT DE NEMOURS & CO.
1007 Market Street
Wilmington, Delaware 19898

FMC CORPORATION
2000 Market Street
Philadelphia, Pennsylvania 19103

RHONE-POULENC, INC.
P.O. Box 125
Black Horse Lane
Monmouth Junction, New Jersey 08852

ROHM AND HAAS COMPANY
Independence Mall West
Philadelphia, Pennsylvania 19105

STAUFFER CHEMICAL COMPANY
Nyala Farm Road
Westport, Connecticut 06881

UNIROYAL, INC.
Benson Road
Middlebury, Connecticut 06949

VELSICOL CHEMICAL CORPORATION
341 East Ohio Street
Chicago, Illinois 60611

ZOECON CORPORATION
975 California Avenue
Palo Alto, California 94304

PHILLIPS, NIZER BENJAMIN KRIM & BALLON
40 West 57th St.
N.Y.C. 10019 997-9700
Attorneys For Plaintiffs

DEFENDANTS

WILLIAM D. RUCKELSHAUS
Administrator, United States Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

and

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460

LEE VERSTANDIG, Acting Admin., U.S. Environmental Protection Agency et al.

U.S. ATTORNEY
1 Sta. Andrew Plaza
N.Y. N.Y.
Michael Dollinger

Date	Nr.	Proceedings
06-30-76	1	FILED COMPLAINT, ISSUED SUMMONS.
07-09-76	2	Filed summons & marshal's return. Served: Russell E. Train by certified mail Receipt #233906 on 7-2-76. United States Environmental Protection Agency by certified mail Receipt #233905 on 7-2-76. U.S. Attorney General Dept. of Justice, Washington, D.C. by certified mail Receipt #233904 on 7-2-76. U.S. Attorney, S.D.N.Y. on 7-2-76.
07-19-76	3	Filed Pltffs. Amended Complaint
07-26-76	4	Filed Pltffs. Motion of Rohm & Haas Corp., AmChem Products Inc. Stauffer Chemical Co. & FMC Corp. to Intervene. Ret. Sine Die.
07-26-76	5	Filed Pltffs. Memorandum in support of Motion of Rohm & Haas Corp., Amchem Products Inc. Stauffer Chemical Co. & FMC Corp. to intervene.
08-30-76	6	Filed Pltffs'. motion for leave to amend the complaint to add the U.S. Environmental Protection Agency as a party Deft.
08-30-76	7	Filed motion of the Upjohn Company for leave to intervene as a Pltff.
08-30-76	8	Filed memorandum of Upjohn Company in support of motion to intervene.
08-30-76	9	Filed affidavit of filing by Ira E. Wiener on 8-12-76, of the motion of Upjohn to intervene and memorandum in support of motion to intervene.
09-07-76	10	Filed affidavit & notice of motion of Uniroyal, Inc. for leave to intervene as a Pltff., ret. 10-1-76.
10-5-76		Filed memo endorsed on motion dated 8-30-76 ... Motion granted So ordered Owen J.

10-5-76		Filed memo endorsed on motion dated 7-26-76 ... Motion granted So Ordered Owen J.
10-5-76		Filed memo endorsed on motion dated 9-7-76 ... Motion granted So Ordered Owen J.
10-5-76	11	Filed stip & order consenting to motion to intervene etc. Owen J.
10-5-76	—	Filed memo endorsed on motion dated 8-30-76 ... Motion granted So ordered Owen J.
10-08-76	12	Filed stip & order re use of records and terminology to be used. Owen J.
11-17-76	13	Filed Ralston Purina Notice of Motion for order to serve an amended complaint. Ret. 11-24-76.
11-17-76	14	Filed REVISED 2nd Amended Complaint.
11-24-76	15	Filed stip and order of dismissal as to pltffs National Agricultural Chemicals Association So ordered Owen J.
12-1-76	16	Filed affidavit and notice of motion for order transferring matter to Dist of Columbia. ret. 12-16-76 at 2:15 PM
12-1-76	17	Filed memo of law in support of motion to transfer.
12-6-76	18	Filed stip and order motion of Ralston Purina to intervene by filing the proposed complaint is consented etc. Owen J.
12-6-76		Filed memo end. on motion dated 11-17-76 motion granted on stip. of parties So ordered R. Owen J.
12-13-76	19	Filed memo in opposition to defts motion to transfer.
12-16-76	20	Filed reply memo of law in support of defts motion to transfer.
12-16-76	21	Filed stip of substitution of Arthur Dry and Kalish for Cravath.
01-11-77	22	Filed notice of motion for leave to intervene as pltff by Rhodia. ret. sine die.

01-19-77	23	Filed stip and order consenting to intervention of Rhodia Inc. etc. Owen J.
01-24-77	24	Filed ANSWER of Deft Train and EPA (USA)
02-8-77	25	Filed 3rd amended complaint with affidavit of service by mail.
02-25-77	26	Filed memo and order ... deft motion to transfer to Dist of D.C. denied. So ordered Owen J. m/n
03-1-77	27	Filed ANSWER of deft Tranin [sic] and EPA (AUSA)
10-19-78		PRE-TRIAL CONFERENCE HELD BY Owen, J.
11-14-78	28	Filed stip and order pur. to Rule 14(a) FRCP, that the pltffs file their Fourth Amended Complt. consented by the defts ... Owen, J.
11-20-78	29	Filed stip and order, that the following schedule will be observed in developing & presenting pltffs' Motion for a preliminary injunction in this matter: Pltffs. will file their motion Ret: 1-5-79, on 11-24-78; Defts will file their opposition to pltffs' motion on 12-15-78 & Pltffs will file their reply to defts' opposition on 12-26-78 ... Owen, J.
11-20-78	30	Filed stip and order pur. to Rule 14(a) FRCP, that the pltffs file their Fourth Amended Complt. & that the defts. consent to the filing thereof. The parties further stipulate to the voluntary dismissal of pltff. Stauffer Chemical Co. without prejudice & without costs ... Owen, J.
11-20-78	31	Filed pltffs FOURTH AMENDED COMPLAINT for Declaratory Judgt. & Injunction.
12-6-78	32	Filed pltffs. NOTICE OF MOTION for Preliminary Inj., as is set forth more fully in the attached motion & memorandum in support of the motion, pltffs assert that the 5th Amendment to the US Constitution renders void Sections 3 and 10 of the Federal Insecticide, etc. Ret: 1-12-79 at 10:00 a.m.

12-06-78	33	Filed MOTION of pltffs for Preliminary Inj. in this matter enjoining the defts. the US Envrionmental Protection Agency & its Admin. Douglas M. Costle etc.
12-6-78	34	Filed pltffs' PRELIMINARY INJUNCTION.
12-6-78	35	Filed pltffs' AFFIDAVITS.
12-6-78	36	Filed MEMORANDUM OF Pltffs in support of motion for preliminary inj.
12-26-78	37	Filed stip and order, 1/Certain exhibits to one of the affdvts. by pltffs. in support of their Motion for Prel. Inj. are considered by pltffs. to be trade secrets; 2/Exhibits 4&5 of John Boehle, Jr's Affdvt. entitled "Summary Sheets of Atrazine Data in EPA Submissions etc. 3/Pltffs seek & defts consent entry of an order by the Court. pur. to Rule 26(c)(7) FRCP permitting pltffs to submit exhibits for hearing etc. 4/By consenting the entry of this order, defts do not in any way concede that the exhibits are, trade secrets or that they are entitled to protection as such under any law.... Owen, J.
01-22-79	—	Filed MEMO ENDORSED on LETTER dated 1-10-79 to Judge Owen, J. from Jacqueline M. Warren (Staff Attny.) The application is granted. So ordered Owen, J. m/n
01-22-79	38	Filed Pltffs response to Request of the Environmental Defense Fund to file a Brief Amicus Curiae.

01-23-79	39	Filed MEMORANDUM of Amicus Curiae Environmental Defense Fund, in opposition to pltffs' Motion for Preliminary Injunction. (Jacqueline M. Warren attny. for amicus curiae)
01-24-79	40	Filed USA's AFFDVT. in opposition of Douglas D. Campt. with Affdvts. attached.
01-24-79	41	Filed defts MEMORANDUM OF LAW in opposition to pltffs' Motion for a Preliminary Injunction.
01-24-79	42	Filed ANSWER of defts. Douglas M. Costle & the Environmental Protection Agency. TO THE Fourth Amended Complt. (RBF)
02-1-79	43	Filed U.S.A.'s AFFIDAVIT of Marvin A. Schneiderman.
02-16-79	44	Filed pltffs' Notice of Application for Temporary Restraininig Order.
02-20-79	45	Filed pltffs' REPLY MEMORANDUM in support of motion for preliminary injunction.
03-22-79	46	Filed stip and order, Notice has been provided to the defts' counsel in writing that such applications are believed to rely on a pltff's trade secret data. deft' will not issue any such registration for a pesticide containing a "specified active ingredient" which a pltff. has submitted research & test data claimed to constitute a trade secret etc. Defts may terminate any part of this agreement by providing 15 days prior notice in writing to pltffs' counsel. So ordered Owen, J.
04-9-79	47	Filed Notice of APPEARANCE, that Robert L. Ackerly as *Pltffs' attny.* (SCC)
04-11-79	48	Filed *FIFTH AMENDED COMPLAINT* for Declaratory Judgment and Injunction, of pltffs'.

04-11-79	49	Filed Stip and order, that pltffs may amend their complt. by filing the fifth Amended Complt. adding the Union Carbide Corp. & Stauffer Chemical Co. as pltffs. Named pltffs' shall be subject to all motions, stips. agreements etc. the defts' are not required to file any further answer to the Fifth Amended Complt. So ordered Owen, J.
06-13-79	50	Filed transcript of record of proceedings, dated 2-23-79
07-10-79	51	Filed OPINION #48837, Pltffs request of Preliminary Injunction restraining the Environmental Protection Agency from disclosing research date which was submitted to govt. agencies in support of various pesticide applications & which pltffs. consider to be trade secrets. Act, 7 U.S.C. § 136 et seq. Trade Secrets Act, 18 U.S.C. § 1905 prohibits the unauthorized disclosure of trade secrets by agency officials & makes such disclosure punishable as a crime. The Prel. Inj. restraining the Environmental Protection from disclosing trade secret research etc. is granted pending a trial on the merits herein. In the circumstances of this case a bond is not required. The parties are to appear on 8-14-79, at 4:30 P.M. in room 2804 to fix a date for trial on the merits. Submit order on Notice. Owen, J. m/n
07-12-79	52	ERROR
08-15-79	53	Filed pltffs' Preliminary Injunction, Ordered that pending a trial on the merits on pltffs' application for a declaratory judgt. & permanent inj. the defts and their agents, officers & other subordinates & all other persons are enjoined & restrained from disclosing any pltff's

claimed trade secret research or test data as so stated. Owen, J.

09-4-79 54 Filed stip and order that pltffs' may file the Supplement to the FIFTH AMENDED COMPLT. effecting the intervention of E.I. du Pont de Nemours & Co. & Velsicol Chemical Corp. as pltffs. All orders, stips. & agreements previously filed shall be effective as to E.I. du Pont & Velsicol Chemical Corp. *The defts shall not be required to answer or respond to the Supplemental Fifth Amended*. So ordered. Owen, J.

09-14-79 55 Filed defts' NOTICE OF APPEAL TO THE SUPREME COURT—from an order filed 8-15-79 granting a preliminary injunction. m/copies to Sellers, Conner & Cuneo—Arthur, Dry & Kalish on 9-20-79.

09-14-79 56 Filed defts' NOTICE OF APPEAL to the USCA for the Second Circuit from an order filed 8-15-79, granting a preliminary injunction. This appeal is taken pur. to 28 U.S.C. §§1252 and 2101 m/copies to Sellers, Conner & Cuneo—Arthur, Dry & Kalish on (9-20-79).

10-9-79 57 Filed letter Michael H. Dolinger Asst. U.S. Atty. Tele. No. 1968 dtd. 2/20/79 to Judge Owen. Re: whether any injunctive relief of nature sought be issued, etc. or 3 Judge Court. etc.

10-3-79 58 Filed true copy of Mandate re: Stip. & Order from USCA. Stip. that the appeal be and it hereby is withdrawn without prejudice to reinstatement within twenty days after the Supreme Court of the U.S. has acted finally on appellants' direct appeal now pending before it purs. to 28 USC 1252 and a Notice of Appeal filed 9-14-79. If the appeal to this Court

is not thus reinstated, it shall be deemed withdrawn with prejudice ... Clerk. USCA.

10-12-79 59 Filed stip and order, that pltffs may file the aforesaid Supplement to the Fifth Amended Complaint, attached hereto, effecting the intervention of Abbott Labs. as a pltff in this action. All orders, stips. and agreements' previously filed in this action shall be affected as to Abbott Labs. The defts shall not be required to answer or otherwise respond to the Supplement to the Fifth Amended Complt. So ordered Owen, J.

12-4-79 60 Filed USA's Notice of Reinstatement of Appeals.

12-6-79 61 Filed stip and order, that the Notice of Appeal to the United States Supreme Court filed by defts. on 9-14-79 is dismissed. So ordered Owen, J.

12-26-79 62 Filed stip of VOLUNTARY DISMISSAL & of Intervention, & Order, *Pltff Ralston Purina is dismissed without prejudice* pur. to Rule 41(a) FRCP. Pltffs may file the Supplement to the 5th Amended complt. etc. All orders stips & agreements previously filed shall be effective as to Sandoz, Inc. The defts shall not be required to answer or respond to the Supplement to the Fifth Amended Complt. So ordered Owen, J.

12-28-79 63 Filed *SUPPLEMENT TO FIFTH AMENDED COMPLAINT*—for Declaratory Judgt. & Injunction by Sandoz, Inc.

12-21-79 64 Filed Certification of record on appeal to the USCA for the Second Circuit.

10-14-80 65 Filed AFFDVT. & NOTICE OF MOTION For Salsbury Labs. Inc., pur. to Rules 24 & 25, FRCP joining Salsbury Labs.

		as a party to this action as partial successor in interest to pltff Rhone-Poulenc, Inc. etc. Ret: 10-24-80 at 9:30 a.m. room 128
—	10-14-80	66 Filed MEMORANDUM in support of motion of Salsbury Labs. Inc. for partial substitution & intervention.
	11-18-80	— Filed MEMO ENDORSED on document #65, The motion is granted etc. Owen, J. m/n
	12-2-80	67 Filed ORDER, Ordered that Salsbury Laboratories, Inc. & is joined as a party to this action as partial successor in interest to pltff Rhone-Poulence, Inc. & Ordered that Salsbury Labs. Inc. be granted full status as a pltff-intervenor in this action Owen, J. m/n
	03-3-81	68 Filed ORDER Ordered that this action is transferred to the suspense docket. So Ordered Owen, J. copy to Ray S.
	04-9-81	69 Filed true copy of USCA MANDATE with Opinion, Ordered that Judgt. of Dist. Court is reversed in accordance with the opinion of this court with costs to be taxed against the pltffs-appellees. Docketed as a Judgt. #81,0394 with Bill of COSTS, Taxed in favor of Deft. Appellants in the sum of $1,649.13
	04-22-81	70 Filed true Copy of ORDER from *Supreme Court of the U.S.* Ordered that the effect of the order of this Court denying the petition for a writ of certiorari in this action & the same is hereby, suspended pending the *timely* filing & disposition of a petition for rehearing.
	04-28-81	71 Filed MINUTE ORDER pur. to MEMORANDUM from the Admin. Office dtd. 6-15-73. The Clerk is instructed to submit a JS-6 form. So ordered Chief Judge MacMahon.

	05-14-81	72 Filed pltffs' NOTICE OF MOTION, pur. to Rules 40 and 65, FRCP accelerating the trial of this case, granting a prel. inj. restraining defts from publicly dislosing the trade secret research data submitted to them by pltffs etc. Ret: 5-22-81 at 2:15 p.m. room 128.
	05-14-81	73 Filed MEMORANDUM OF PLTFF's in support of motion for acceleration of Trial, for Prel. Inj. & for consolidated Hearing.
	05-14-81	74 Filed AFFDVT. of Charles O. O'Brien
	05-14-81	75 Filed AFFDVT. of Samuel J. Talucci.
	05-14-81	76 Filed AFFDVT. of Haney B. Camp.
	05-14-81	77 Filed AFFDVT. of George Ray Ferguson.
	05-14-81	78 Filed AFFDVT. of Donald E. Rosen.
	05-14-81	79 Filed AFFDVT. of Harry W. Hays.
	05-14-81	80 Filed AFFDVT. of G. Gregor Rohwer.
	05-15-81	81 Filed AFFDVT. by Michael H. Dolinger in opposition to the motion of pltffs.
	5-19-81	82 Filed govt's. MEMORANDUM OF LAW in opposition to pltffs' Motion for a Prel. Inj. and Accelerated Trial.
	05-21-81	83 Filed SUPPLEMENTAL MEMORANDUM of pltffs' on the authority of the court to grant Interim relief. (sent to chambers)
	05-21-81	84 Filed defts' MEMORANDUM OF LAW in Reply to pltffs' "Supplemental Memorandum"
	05-22-81	85 Filed stip and order of Voluntary Dismissal as to Pltff. Salsbury Laboratories, Inc. ONLY, is dismissed without costs to any party. So ordered Owen, J.
	06-15-81	86 Filed ORDER, Ordered that the prel. Inj. order ent. 8-15-79 is Vacated. Pierce, J. m/n
	06-16-81	87 Filed REPLY MEMORANDUM of pltffs. in support of Motion for Acceleration of

Trial, for a Prel. Inj. & for a Consolidated Hearing.

06-15-81 — Filed MEMO ENDORSED ON Document #72—The motion is denied except to possible acceleration of the trial which will be the subject of a conference of counsel & this Court on 6-19-81, at 11:30 a.m. in room 128. So ordered Owen, J. m/n

07-7-81 88 Fld stip & order re procedures to be employed during pendency of this action re disclosure OWEN J

07-27-81 89 Filed transcript of record of proceedings, dated 5-19-81

08-19-81 90 Filed *CONFIDENTIALITY STIP & ORDER*, that all affdvts. filed herein, exhibits & other materials marked "confidential" shall be held *in camera* by the Court & filed UNDER SEAL with the Clerk, etc. as indicated. So ordered Owen, J.

08-19-81 91 Filed stip and order of voluntary Dismissal of SANDOZ, INC., dismissed with prejudice but without costs etc. So ordered Owen, J.

09-2-81 92 Filed plffs' AFFDVT. & NOTICE OF MOTION for summary judgt. pur. to Rule 56 FRCP that sections 10 and 3(c)(1)(D) of the Federal Insecticide, Fungicide & Rodenticide Act, etc. Further Notice that, by stip. opposing papers are to be served on or before 9-25-81. Ret: 10-2-81 at 2:15 p.m.

09-2-81 93 Filed CONFIDENTIAL AFFDVTS. IN LARGE Brown folder Sealed & Impounded & placed in VAULT. Set A-original (1 of 2)

09-2-81 94 Filed CONFIDENTIAL AFFDVTS & MEMORANDUM in support, in LARGE Brown folder Sealed and Impounded & placed in VAULT. Set A-original (2 of 2).

09-3-81 95 Filed stip & order, for Amendment of the Fifth Amended Complt. Dismissal of certain counts therein, etc. as indicated.

10-7-81 96 Filed stip and order adj. pltffs' motion for summary judgt. to 10-21-81 same time & place & defts. shall serve answering papers on 10-15-81. So ordered Owen, J.

10-22-81 97 Filed stip and order that pltffs' motion for summary judgt. be adj. to 12-4-81. defts. shall serve answering papers 10-26-81 & pltff shall serve answering papers 11-20-81. So ordered Owen, J.

10-27-81 98 Filed defts' affdvt & notice of motion for an order dismissing the complt ... ret: 12-4-81

10-27-81 99 Filed defts' memo of law in support of motion to dismiss or summ. judg. and in opp. to pltff's motion for summ. judg.

10-27-81 100 Filed defts' response to pltffs' statement purs. to rule 3(g).

10-27-81 101 Filed defts' affdvt of Robert Forrest.

10-27-81 102 Filed defts' affdvt of Nancy B. Broff.

10-27-81 103 Filed defts' affvt of Therese Murtagh.

10-27-81 104 Filed defts' affdvt of Richard Schmitt.

10-27-81 105 Filed defts; affdvt of Michael H. Dolinger.

11-10-81 106 Filed pltffs' request for production of documents.

12-1-81 107 Filed stip and order adj. summary judgt. motions to 12-18-81. So ordered Owen, J.

12-3-81 108 Filed pltffs' Response to defts' Statement pur. to Rule 3(g).

12-3-81 109 Filed defts' Rule 34 Response & Objections.

12-9-81 110 Filed pltffs' AFFDVT. & MOTION to compel Production of Pesticide Labels pur. to 37(a) FRCP compelling defts to produce for inspection & copying all doc-

uments in their possession etc. Ret: 12-18-81 at 2:15 p.m.

12-9-81 111 Filed AFFDVT. of Richard L. Conn for pltffs.

12-9-81 112 Filed REPLY MEMORANDUM of pltffs. in support of Motion for summary judgt. & in opposition to defts' Motion to dismiss or for summary judgt.

12-16-81 113 Filed REPLY MEMORANDUM OF LAW in support of defts.' Motion to dismiss or for summary judgment.

12-23-81 114 Filed Stip and order that the Return date of the parties' respective summary judgt. motions in adj. to 12-18-81. So ordered Owen, J.

01-15-82 115 Filed AFFDVT. to Michael H. Dolinger for USA.

03-16-82 116 Filed transcript of record of proceedings, dated 1-15-82

03-3-83 117 Filed pltffs' NOTICE OF MOTION pur. to Rule 15(a) FRCP to amend their complt to dismiss Court I thereof without prejudice. Ret: 3-21-83

03-3-83 118 Filed pltffs' NOTICE OF MOTION or leave to file supplemental Memorandum in support of motion for summary judgt. Ret: 3-21-83

03-3-83 119 Filed SUPPLEMENTAL MEMORANDUM of pltffs in support of Motion for summary judgt.

03-21-83 120 Filed MEMORANDUM OF LAW in opposition to pltffs' Motion to dismiss Count 1 without prejudice

04-4-83 121 Filed REPLY BRIEF of pltffs. in support of Motion for Leave to dismiss Count 1.

04-14-83 122 Filed defts' SUPPLEMENTAL MEMORANDUM OF LAW in opposition to pltffs' Motion for summary judgt.

05-2-83 123 Filed stip and order of Voluntary Dismissal of the Upjohn Co. & Order dismisses its claims against the defts. So ordered Owen, J.

05-2-83 124 Filed stip and order of Intervention of Zoecon Corp. shall hereby intervene as a pltff. in this action & plead as its claim the aforesaid count V of the complt. as amended by order dated 8-31-81. So ordered Owen, J.

05-19-83 125 Filed SUPPLEMENTAL REPLY MEMORANDUM of pltffs. in support of motion for Summary Judgt.

06-20-83 126 Filed pltffs' Reply to defts' Letter to the Court of 6-6-83. (ADK)

07-29-83 127 Filed OPINION & ORDER #55042, This leaves the courts with no power to make any "informed, final determination" of a data submitter's right to compensation. Such an assignment of powers to arbitrators cannot be sustained in the face of Article III. Submit order on notice effectuating the foregoing. Owen, J. m/n

09-19-83 128 Filed MEMORANDUM of pltffs. in opposition to defts' Proposed Judgment.

09-27-83 129 Filed defts' REPLY MEMORANDUM in support of their Proposed Judgt.

09-30-83 130 Filed pltffs' REPLY MEMORANDUM in support of Proposed Judgt.

10-11-83 131 Filed defts' MEMORANDUM in opposition to pltffs' Modified Proposed Judgt. for USA

10-12-83 132 Filed pltffs' REPLY MEMORANDUM in support of Proposed Judgt. as Modified.

10-17-83 133 Filed defts' sur-reply memorandum in support of their proposed Judgment.

10-19-83 134 Filed Pltffs' Response to defts' Sur-Reply Memorandum.

11-30-83 135 Filed JUDGT. & ORDER, Ordered that the provisions for determination of compensation of section 3(c)(1)(D) Fed. Insecticide, Fungicide & Rodenticide Act,

as amended by the Federal Pesticide Act etc. Ordered that summary judgt. is ent. in favor of the defts & Count I of the amended complt. is dismissed with prejudice. Each party to bear its own costs. Owen, J. judgt. ent. 11-30-83—Clerk ... ent. 11-30-83 m/n

12-21-83 136 Filed USA's NOTICE OF APPEAL from the judgt. ent. on 11-29-83 to the U.S. Supreme Court Wash. D.C. Mailed copies to Kenneth Weinstein, Esq. (McKenna, Connor & Cuneo (1575 Eye St., N.W. Wash. D.C. 20005—Sidney Howell, Esq. (Arthur, Dry & Kalish 1230 Ave. of the Americas N.Y.C.

12-21-83 — Forwarded copy of Notice of Appeal to Dist. Judge & copy of N of A & Docket entries to Court of Appeals

01-3-84 137 Filed MEMO ENDORSED on Letter dated 12-16-83 from McKenna, Conner & Cuneo ... On these papers I see no Loss for the relief requested. The application is therefor denied. Owen, J. m/n

07-17-84 138 Filed pltffs' NOTICE OF MOTION for Leave to Amend Complt pur. to Rules 15(b) and (d) FRCP. Ret: 7-25-84

07-17-84 139 Filed pltff's NOTICE OF MOTION for Reentry of Judgt. on the grounds set forth in the attached memorandum of law & affdvt. of Andrew F. Fink dated 7-13-84.

07-17-84 140 Filed MEMORANDUM in support of pltffs' Motion for Leave to Amend Complt.

07-17-84 141 Filed MEMORANDUM IN SUPPORT OF pltffs' Motion for Reentry of Judgt.

07-17-84 142 Filed SUPPLEMENTAL AFFDVT. of Andrew F. Fink for pltff.

07-18-84 143 Filed pltff's AMENDED COMPLAINT for Declaratory Judgt. & injunction.

07-23-84 144 Filed Notice of MOTION for Preliminary Injunction as set forth in the proposed ordered order which is attached hereto. Ret: 7-25-84.

07-23-84 145 Filed MEMORANDUM In support of pltffs' Motion for a Preliminary Injunction.

07-24-84 146 Filed SECOND SUPPLEMENTAL AFFDVT, of Andrew F. Fink.

07-24-84 147 Filed SUPPLEMENTAL MEMORANDUM in support of pltffs' Motion for a prel. Inj.

07-26-84 148 Filed defts. NOTICE OF MOTION granting summary judgt. to the defts pur. to Rule 56 FRCP Ret: 7-25-84.

07-26-84 149 Filed MEMORANDUM OF LAW. in opposition to pltffs' Motions for a Prel. Inj. & for Reentry of Judgt. & in support of defts' Motion to Dismiss or for summary Judgt.

07-31-84 150 Filed MEMORANDUM & ORDER, In order to enable the Court to carry out the mandate of the Supreme Court all conduct which would constitute a change in position of the parties herein is to be stayed for 10 days. Stay may be granted upon application to the Court. So ordered. Owen, J. m/n

08-7-84 151 Filed *JUDGMENT & ORDER*, Ordered that the provisions for the determination of compensation of section 3(c)(1)(D) etc. of the Federal Insecticide, Fungicide etc. as indicated. Ordered that deft. *Wm. Ruckelshaus* as Administrator of the U.S. EPA, & his officers agents etc. are permanently enjoined as indicated. Owen, J. m/n EOD 8-8-84

08-8-84 152 Filed true copy of Supreme Court of the U.S. Order, Ordered that the judgt of the US Dist. Court is vacated & this

cause is remanded ... for the So. Dist. of N.Y. for further consideration etc.

08-17-84 153 Filed pltffs' NOTICE OF MOTION to amend the Judgt. in accordance with the proposed Findings of Fact, Conclusions of Law & Order submitted herewith.

08-17-84 154 Filed MEMORANDUM in support of pltff's Motion to Amend Judgt.

08-20-84 155 Filed defts' NOTICE OF MOTION pur. to Rule 62(c) FRCP staying the effect of its 8-7-84 Judgt. & Order in its entirety or staying the effect of its judgt. & order, Ret: 9-4-84

08-20-84 156 Filed MEMORANDUM OF LAW in support of defts' Motion for stay of judgt.

08-30-84 157 Filed MEMORANDUM of pltffs in opposition to defts' Motion for Stay of Judgt. Pending Appeal.

08-30-84 158 Filed MEMORANDUM OF LAW in opposition to pltffs' Motion to Amend the Judgt.

09-5-84 159 Filed MEMO ENDORSED with Notice of Motion pur. to Rule 62(c) FRCP, STAYING the effect of its 8-7-84 Judgt. & Order in its entirety etc. Ret: 9-4-84 ... On the entire record & Motions of this action the motion is denied ... Owen, J. m/n

09-5-84 160 Filed stip and Order that the firm of Phillips, Nizer, Benjamin, Krim & Ballon is substituted in place of Arthur Dry & Kalish for the pltff with supporting Affdvt.

09-5-84 161 Filed SUPPLEMENTAL FINDINGS OF FACT, CONCLUSION OF LAW & ORDER, Accordingly the Court will enter judgt. upon the following findings of fact & conclusions of law: Pltff Stauffer Chemical Co. submitted substantial research data to EPA in support of

pesticide registrations for products containing burylate & EPTC as well as other active ingredients ... etc. as so indicated. Owen, J. m/n

09-6-84 162 Filed defts' NOTICE OF APPEAL to the *U.S. Supreme Court Wash. D.C.* from judgt. dtd. on 8-7-84 & 9-4-84 ... Mailed copies to KENNETH WEINSTEIN, ESQ. 1575 Eye St. N.W. Wash. D.C. 20005 and Alan Zetterberg Esq. 40 W. 57th St. N.Y.C. 10019

09-7-84 — Forwarded copy of Notice of Appeal to U.S. Supreme Court and Copy of Notice of Appeal to Dist. Judge & copy of Notice of Appeal & docket entries to Court of Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC.
Old Ridgebury Road, Sec. P-3
Danbury, Connecticut 06817,

ABBOTT LABORATORIES
Abbott Park
North Chicago, Illinois 60064

CIBA-GEIGY CORPORATION
444 SAWMILL RIVER ROAD
ARDSLEY, NEW YORK 10502,

E.I. DUPONT DE NEMOURS & CO.
1007 MARKET STREET
WILMINGTON, DELAWARE 19898

FMC CORPORATION
2000 Market Street
Philadelphia, Pennsylvania 19103,

RHONE-POULENC, INC.
P.O. BOX 125
Black Horse Lane
Monmouth Junction, New Jersey 08852

ROHM AND HAAS COMPANY
Independence Mall West
Philadelphia, Pennsylvania 19105

STAUFFER CHEMICAL COMPANY
Nyala Farm Road
Westport, Connecticut 06881,

UNIROYAL, INC.
Benson Road
Middlebury, Connecticut 06949

VELSICOL CHEMICAL CORPORATION
341 East Ohio Street
Chicago, Illinois 60611,

and

ZOECON CORPORATION
975 California Avenue
Palo Alto, California 94304, Plaintiffs,

v.

WILLIAM D. RUCKELSHAUS
Administrator, United States Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460,

and

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
401 M Street, S.W.
Washington, D.C. 20460, Defendants.

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION
76 Civ. 2913 (RO)

JURISDICTION

1. This action arises under the Constitution of the United States, and under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1982) (hereinafter "FIFRA"). This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) (1982).

THE PARTIES

2. Plaintiffs are developers and marketers of pesticides.

3. Union Carbide Agricultural Products Company, Inc. is incorporated in the State of Pennsylvania and does business in the State of New York.

4. Ciba-Geigy Corporation is incorporated in the State of New York and resides within this judicial district.

5. Abbott Laboratories is incorporated in the State of Illinois and does business in the State of New York.

6. E.I. DuPont de Nemours is incorporated in the State of Delaware and does business in the State of New York.

7. FMC Corporation is incorporated in the State of Delaware and does business in the State of New York.

8. Rhone-Poulenc, Inc. is incorporated in the State of New York and does business in the State of New York.

9. Rohm and Haas Company is incorporated in the State of Delaware and does business in the State of New York.

10. Stauffer Chemical Company is incorporated in the State of Delaware and does business in the State of New York.

11. Uniroyal, Inc. is incorporated in the State of New Jersey and does business in the State of New York.

12. Velsicol Corporation is incorporated in the State of Delaware and does business in the State of New York.

13. Zoecon Corporation is incorporated in the State of Delaware and does business in the State of New York.

14. Defendant United States Environmental Protection Agency (hereinafter "EPA") is a federal executive agency which is charged with the administration of FIFRA.

15. Defendant William D. Ruckelshaus is the Administrator of EPA. Defendants are hereinafter referred to collectively as "EPA."

STATUTORY PROVISIONS

16. This case arises under section 3(c)(1)(D) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D), as amended by the Federal Pesticide Act of 1978. This section provides, *inter alia*, that with respect to research data submitted to EPA on or after January 1, 1970, the Administrator may consider such data in support of an application by any other applicant within the fifteen-year period following the date the data were submitted, only if the applicant has made an offer to compensate the original data submitter. If the data submitter and applicant fail to agree upon the terms and amount of compensation, either party may initiate binding arbitration proceedings by the Federal Mediation and Conciliation Service, whose findings and determinations are final and conclusive. No official or court of the United States has power or jurisdiction to review any such findings and determination, except for fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator.

COUNT I

17. Since January 1, 1970, each plaintiff has submitted, and is continuing to submit to EPA, research data to support and maintain pesticide registrations. Since September 30, 1978, EPA has considered research data submitted by plaintiffs to support pesticide registrations of other companies.

18. Plaintiff Stauffer Chemical Company submitted to EPA research data in support of pesticide registrations for products containing the active ingredients butylate and EPTC, among others. Some of these data were submitted between January 1, 1970 and October 21, 1972; some were submitted between October 21, 1972 and September 30, 1978; and some were submitted after September 30, 1978. After September 30, 1978, EPA considered these data to support me-too pesticide registrations on behalf of other applicants, including PPG Industries Inc. and Drexel Chemical Company, for pesticides containing butylate and EPTC. These registrations would not have been issued if EPA had not used Stauffer's data. These data were used by EPA without Stauffer's consent.

19. Stauffer demanded an arbitration pursuant to section 3(c)(1)(D) of FIFRA to obtain compensation for the use of its data to support PPG's me-too registrations for butylate. A panel of three arbitrators made an award to Stauffer in this arbitration on June 28, 1983. *In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries Inc.*, AAA Docket No. 16 199 077 82 FIFRA. The arbitrators found that EPA considered data submitted by Stauffer to support PPG's pesticide registrations for butylate. The arbitrators did not award Stauffer the amount of compensation it claimed.

20. Stauffer and the other plaintiffs are aggrieved by EPA's use of their research data to grant pesticide registrations to other applicants under section 3(c)(1)(D), because in order to obtain the compensation that FIFRA provides as a condition for EPA's use of their data, plaintiffs are compelled to resort to an arbitration procedure that violates their right to an adjudication that complies with Ar-

ticles I and III of the Constitution. Stauffer is aggrieved by the failure of the arbitrators in the butylate proceeding to award the amount of compensation Stauffer claimed.

21. The provisions for the determination of compensation of section 3(c)(1)(D) of FIFRA, as amended by the Federal Pesticide Act of 1978 (not including the provisions of § 3(c)(1)(D)(i)), are unconstitutional as a violation of Articles I and III of the Constitution.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

a. A Declaratory Judgment that the provisions for determination of compensation of section 3(c)(1)(D) of FIFRA, as amended by the Federal Pesticide Act of 1978 (not including the provisions of section 3(c)(1)(D)(i)), are unconstitutional as a violation of Articles I and III of the Constitution.

b. A Permanent Injunction enjoining defendant William D. Ruckelshaus, as Administrator of the United States Environmental Protection Agency, and his officers, agents, employees and representatives, from permitting or implementing any use of data where the submitter's compensation is to be determined under FIFRA § 3(c)(1)(D); provided, that notwithstanding the foregoing, any submitter may file a consent to the use of its data in support of a registration or amendment, in which case such registration or amendment shall not be subject to this injunction.

Respectfully submitted,

McKENNA, CONNER & CUNEO

BY _____

KENNETH W. WEINSTEIN
LAWRENCE S. EBNER
STANLEY W. LANDFAIR
DAVID I. BOOKSPAN

1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

ARTHUR, DRY & KALISH

BY _____

ALAN C. ZETTERBERG
1230 Avenue of the Americas
Rockefeller Center
New York, New York
(212) 489-2635
Attorneys for Plaintiffs

DATED: JULY 16, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 CIV. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL. PLAINTIFFS,

against

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REENTRY OF JUDGMENT

MCKENNA, CONNER & CUNEO
KENNETH W. WEINSTEIN
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Attorneys for Plaintiffs

DATED: JULY 16, 1984

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR REENTRY OF JUDGMENT

This case is before the Court on remand from EPA's appeal to the Supreme Court. Without adjudicating the merits of the appeal, the Supreme Court vacated the judgment and remanded for further consideration in light of its decision in *Ruckelshaus* v. *Monsanto Co.*, 52 U.S.L.W. 4886 (June 26, 1984). Plaintiffs move that judgment be reentered because *Ruckelshaus* v. *Monsanto* has no effect on this case.

Preliminary Statement

This Court entered judgment on November 29, 1983, (1) declaring that the provisions for determination of compensation of section 3(c)(1)(D) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are unconstitutional as a violation of Article III, and (2) enjoining EPA from using data for which compensation is to be determined under FIFRA § 3(c)(1)(D).

In its opinion, the Court held that plaintiffs' challenge to section 3(c)(1)(D) is ripe. The Court rejected EPA's contention that the case would not be ripe until after an arbitration award had been rendered. It reasoned that plaintiffs were not challenging the result of any arbitration, but rather the statutory compulsion to resort to an unconstitutional arbitration to obtain compensation for the use of their data. The Court found that plaintiffs were injured by FIFRA's compulsion to use the unconstitutional arbitration scheme to vindicate their compensation rights, and that the constitutionality of the compensation-arbitration scheme "is clearly ripe for resolution." *Union Carbide Agricultural Products Co., Inc.* v. *Ruckelshaus*, 571 F. Supp. 117, 123n.2 (S.D.N.Y 1983).

On June 26, 1984, the Supreme Court issued its decision in *Ruckelshaus* v. *Monsanto Co.* The Court held that EPA's use of some of Monsanto's data under section 3(c)(1)(D) would constitute a taking of its property under the Fifth Amendment. Slip op. at 24-25.

The district court in *Monsanto* had concluded that the taking was unconstitutional because of the unavailability of

just compensation, and therefore it enjoined the taking. The district court found that the only mechanism for obtaining compensation for the taking was the FIFRA arbitration scheme; and that this did not fulfill the "just compensation" requirement of the Fifth Amendment because the arbitration scheme itself was unconstitutional under Article III. *Ruckelshaus* v. *Monsanto*, slip op. at 11, 28-29.

The Supreme Court reversed, holding that the FIFRA arbitration scheme was not the only remedy for a taking. It concluded that a suit for just compensation for a taking could be brought under the Tucker Act, and therefore that equitable relief to enjoin the taking was not proper. Slip op. at 30.

Because the Tucker Act was available to supply just compensation, the Court held that it was not ripe to decide whether FIFRA's arbitration scheme failed to provide just compensation due to its unconstitutionality. The Court stated:

> Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of FIFRA, we conclude that Monsanto's challenges to the constitutionality of the arbitration and compensation scheme are not ripe for our resolution.

Slip op. at 30-31. The Court stated that Monsanto's claims concerning the constitutionality of the arbitration scheme would not be ripe until EPA had considered its data in evaluating another application, and an arbitration award had been made. Slip op. at 31.

On July 2, 1984, the Supreme Court issued a summary order in EPA's appeal of this case. *Ruckelshaus* v. *Union Carbide Agricultural Products Co., Inc.*, 52 U.S.L.W. 3928. The order stated that "the judgment is vacated and the case is remanded to the United States District Court for the Southern District of New York for further consideration in light of *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. ___ (1984)." The Supreme Court's mandate will issue on July 27, 1984. Supreme Court Rule 52.

ARGUMENT

Judgment Should Be Reentered Forthwith

The Supreme Court's decision in *Monsanto* has no effect on this case. The Article III issue in *Monsanto* arose only as an element of Monsanto's claim of an uncompensated taking. The Supreme Court did not reach the Article III issue because it found that the taking could be compensated under the Tucker Act. In this case, the Article III claim stands alone as an independent ground for enjoining any use of data conditioned on arbitration. Because of this difference, plaintiffs' challenge to FIFRA's use-compensation scheme is fully ripe—as this Court already has found. The *Monsanto* case has no application. Therefore the original judgment should be reentered.

1. In *Monsanto*, the Supreme Court held that it was not ripe to determine whether constitutional defects in the FIFRA arbitration scheme preclude it from providing "just compensation" for a Fifth Amendment taking, because the Tucker Act is available to supply just compensation for any taking. Slip op. at 31. The *Monsanto* rationale does not apply here because this is not a taking case.

Plaintiffs here are not alleging a taking, or that FIFRA's arbitration scheme fails to supply just compensation for a taking. Rather, *this is an action to enjoin the use of data under FIFRA § 3(c)(1)(D), where such use is conditioned on statutory compensation that must be obtained through an unconstitutional arbitration scheme.* Unlike the situation in *Monsanto*, here the Tucker Act is irrelevant. The Tucker Act supplies just compensation in the event of a Fifth Amendment taking. It does not supply compensation for use of all data under FIFRA, or cure the Article III defects in the FIFRA arbitration mechanism.

2. This case is ripe because plaintiffs are aggrieved by FIFRA'S use-compensation system. *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81 (1978). Plaintiffs are aggrieved by the use of their data under FIFRA, because that use is conditioned on compensation that must be obtained by resort to an unconstitutional arbitration scheme.

After the preliminary injunction in this case was vacated in June 1981, data submitted by plaintiffs, which are subject to the use-compensation system of section 3(c)(1)(D), were considered by EPA in support of other companies' registrations. *See, e.g.*, Supplemental Affidavit of Andrew F. Fink of Stauffer Chemical Company, dated July 13, 1984, ¶¶2 & 3. And it cannot be disputed that EPA will, if not enjoined, again use plaintiffs' data in support of other companies' registration applications pursuant to section 3(c)(1)(D), further subjecting plaintiffs to the unconstitutional arbitration scheme.

Thus, plaintiffs are aggrieved by EPA's past and threatened future use of their data and by the compulsion to submit to unconstitutional arbitration. Plaintiff's "personal right ... to demand Article III adjudication" of their federal compensation claims is infringed. *See Pacemaker Diagnostic Clinic of America* v. *Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc).

Furthermore, the issues in this case are purely legal. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Plaintiffs do not challenge the result of any arbitration, nor does the adjudication of plaintiffs' claims depend in any manner on the outcome of an arbitration.

Nothing in *Monsanto* changes this Court's decision that plaintiffs' challenge to FIFRA's use-compensation system is ripe.

3. Even under the ripeness criteria applied to Monsanto's Taking Clause challenge—criteria which are not relevant here—this case is ripe. The Supreme Court stated that Monsanto's claim would become ripe "after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award ...." *Ruckelshaus* v. *Monsanto*, slip op. at 31.

It is undisputed that Stauffer Chemical Company's data were considered by EPA under FIFRA to grant me-too registrations for the pesticide butylate to PPG Industries. As a result of the use of Stauffer's data, an arbitration award was made to Stauffer on June 28, 1983. *See* Fink Supplemental Affidavit, ¶3. *In the Matter of the Arbitration Between Stauffer Chemical Co. and PPG Industries, Inc.*, AAA Docket No. 16 199 077 82 FIFRA. (A copy of the award is appended to the Fink Affidavit). Stauffer is aggrieved because its data were used to grant me-too registrations to a major competitor, PPG Industries, because it has been compelled to resort to an unconstitutional arbitration, and because it did not receive an award for the amount of compensation that it claimed.* Fink Supplemental Affidavit, ¶ 4.

In summary, even under *Monsanto's* Taking Clause ripeness criteria, the instant case is ripe because (1) EPA has considered Stauffer's data in approving PPG's butylate registrations; (2) an arbitration award has been rendered; and (3) Stauffer is aggrieved by the use of its data, by the compulsion to resort to the unconstitutional arbitration, and by the failure to obtain the compensation it claimed.

CONCLUSION

For the foregoing reasons plaintiffs request that the original judgment in this case by reentered.

McKenna, Conner & Cuneo
By _____
Kenneth W. Weinstein
Lawrence S. Ebner
Stanley W. Landfair
David I. Bookspan
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

*FIFRA § 3(c)(1)(D) precludes judicial review of Stuffer's award. In fact, Stauffer has received no money as a result of the award, and PPG Industries has filed suit to have the award invalidated as unconstitutional under Article III. PPG Industries, Inc. v. Stauffer Chemical Co., Civil Action No. 83-1941 (D.D.C. filed July 7, 1983).

ARTHUR, DRY & KALISH
By _____
ALAN C. ZETTERBERG
1250 Avenue of the Americas
New York, NY 10020
(212) 841-9300
Attorneys for Plaintiffs

DATED: JULY 16, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. BURFORD, AS ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
DEFENDANTS

AFFIDAVIT OF ANDREW F. FINK

AFFIDAVIT

Andrew F. Fink, being first duly sworn, affirms that the following statement is true and correct.

1. I am Managing Attorney for litigation for Stauffer Chemical Company ("Stauffer"). I am responsible for legal activities in connection with an arbitration proceeding under FIFRA currently in progress between Stauffer and PPG Industries, Inc ("PPG"), In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries, Inc., AAA Dkt. No. 16 199 0077 82 FIFRA.

2. One of Stauffer's most important products is the pesticide butylate. Through extensive research Stauffer discovered butylate, determined the conditions under which it could be effectively used, and established its safety to humans and the environment. Stauffer submitted its research data on butylate to EPA to obtain pesticide registrations for butylate products.

3. In April, 1981 PPG applied to EPA to register butylate products virtually identical to Stauffer's. PPG did not submit research data to support the safety and efficacy of its product but instead, pursuant to FIFRA §3(c)(1)(D)(ii), sought a "me-too" registration based upon Stauffer's research data. As required by section 3(c)(1)(D)(ii), PPG offered to compensate Stauffer for its use of Stauffer's data. This offer was a general one that did not contain any dollar amounts.

4. EPA granted PPG's application for registration in July, 1981. After negotiations to determine compensation proved unsuccessful, Stauffer filed a demand for arbitration pursuant to §3(c)(1)(D)(ii) on April 20, 1982.

5. Stauffer requested the Federal Mediation and Conciliation Service ("FMCS") to appoint arbitrators to hear its case who had not been subjected to training and instruction by EPA on how to determine compensation. Stauffer's objection to the appointment of EPA-trained arbitrators was made because of Stauffer's belief that the EPA instruction advocated several legal interpretations of section 3(c)(1)(D)(ii) concerning the factors for determining compensation with which Stauffer disagreed and which, if

adopted by the arbitrators, would severely prejudice Stauffer's case. On May 25, 1982, FMCS denied Stauffer's request and required the appointment of EPA-trained arbitrators only. (See Exhibits 1 and 2 appended hereto.)

6. In the arbitration proceeding itself, the parties PPG and Stauffer differ categorically on issues of legal interpretation. Stauffer's claim is based on an interpretation of the statute and its legislative history that Stauffer is entitled to be compensated for the *value* received by PPG by being able to rely on Stauffer's research instead of performing its own; on this basis, Stauffer claims compensation of several tens of millions of dollars. PPG's legal position is that it owes Stauffer only a small share of the *cost* of a small portion of Stauffer's research on butylate; on this basis, PPG asserts that it owes Stauffer only a few tens of thousands of dollars. In support of its position, PPG has relied on legal interpretations that were propounded by EPA at the training sessions for FIFRA arbitrators—the training sessions treated by FMCS as a prerequisite to arbitrators' eligibility to sit on FIFRA arbitration panels.

/s/ _____
ANDREW F. FINK

State of Connecticut ss:
County of Fairfield

Subscribed and sworn to before me this ___ day of ___, 1983.

/s/ _____
Notary Public
My Commission Expires:

April 21, 1982

BY HAND

Mr. Wayne Horwitz
Director
Federal Mediation and Conciliation Service
2100 K Street, N.W.
Washington, D.C. 20427

Re: Arbitration Between Stauffer Chemical Company and PPG Industries, Inc. Under FIFRA Arbitration Rules

Dear Mr. Horwitz:

Stauffer Chemical Company yesterday filed with the American Arbitration Association a Demand for Arbitration of its butylate (pesticide) data compensation claim against PPG Industries, Inc. (copy of demand enclosed). To the best of Stauffer's knowledge, this is the first arbitration proceeding ever initiated under § 3(c)(1)(D)(ii) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), and the first of its kind ever administered by the Federal Mediation and Conciliation Service or the AAA.

Under the statute and implementing regulation (FIFRA § 3(c)(1)(D)(ii) and 29 C.F.R. § 1440.1 and Appendix), the FMCS is authorized to appoint an arbitrator. In its demand, Stauffe objects to the appointment as arbitrator in this proceeding of any person who attended the Pesticide Data Disputes Training Seminar conducted by the U.S. Environmental Protection Agency in October, 1980. As discussed in the Demand, mandatory training of an arbitrator on the key substantive issues to be adjudicated in subsequent statutory arbitration proceedings violates the rights of litigating parties to an impartial tribunal and to due process of law. Furthermore, the training was organized and conducted by EPA. That Agency has played a leading role in the formulation, administration and interpretation of FIFRA's data compensation provisions. Moreover, EPA was removed by Congress in 1978 from any further involvement in determination of compensation under the particular

statutory provisions addressed at the seminar and at issue in this proceeding. Stauffer, therefore, has requested the FMCS and the AAA to exclude seminar attendees from all consideration as arbitrator in this proceeding. As of this time, Stauffer does not know whether PPG concurs in or opposes the objection to appointment of the EPA-trained arbitrator.

Needless to say, the selection of an arbitrator in this first FIFRA arbitration will set an important precedent for future proceedings. To facilitate consideration of Stauffer's objection to appointment of an EPA-trained arbitrator, Stauffer hereby requests an opportunity to be heard orally before the FMCS. We await to hear from you in this regard.

Sincerely,
LAWRENCE S. EBNER
Attorney for Stauffer Chemical Co.

cc: Ms. Garylee Cox
Regional Director
American Arbitration Association

Mr. John F. Flanagan
Supervisor, Pesticide Registration
PPG Industries, Inc.

David R. Berz, Esquire
Wald, Harkrader & Ross

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, D.C. 20427

May 25, 1982

Mr. Lawrence S. Ebner, Esq.
McKenna, Conner & Cuneo
1575 Eye Street, N.W.
Washington, DC 20005

Mr. David R. Berz, Esq.
Wald, Harkrader & Ross
1300 19th Street, N.W.
Washington, DC 20036

RE: 16 199 0077 82 FIFRA, Stauffer Chemical Company and PPG Industries, Inc.

Dear Mr. Ebner and Mr. Berz:

This is the decision of the Federal Mediation and Conciliation Service (FMCS) on the issue of use in deciding FIFRA disputes of arbitrators who attended a training session held by the Environmental Protection Agency (EPA) and the American Arbitration Association (AAA).

I have carefully considered the voluminous correspondence and the arguments made at the meeting on May 12, 1982. I have also reviewed the materials used in the training seminar. My conclusions are as follows:

1. The arbitrators who attended the training session received entirely appropriate instruction and have not been unfairly biased.

2. The parties have not agreed to selection of an arbitrator pursuant to Section 7 of the FIFRA Arbitration Rules.

3. The arbitrators who attended the training session are best qualified to determine FIFRA disputes. It was the decision of FMCS prior to the training session to use the trained arbitrators as the initial cadre of FIFRA arbitrators. Therefore, by copy of this letter I am directing AAA to submit to the parties a list of names of arbitrators who attended the training session pursuant to Section 6 of the FIFRA Arbitration Rules.

Sincerely,

/S/ NANCY B. BROFF
General Counsel

cc: Garylee Cox
Mike Hoellering

UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL
PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR
OF THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, ET AL., DEFENDANTS.

SUPPLEMENTAL AFFIDAVIT OF ANDREW F. FINK

1. I am the Managing Attorney for Litigation for Stauffer Chemical Company. This affidavit supplements my prior affidavit in this proceeding dated January 17, 1983, which is attached hereto as Exhibit 1.

2. Stauffer submitted to EPA, after January 1, 1970, substantial research data in support of pesticide registrations for products containing the active ingredients butylate and EPTC, as well as other active ingredients. Some of the data were submitted during the period January 1, 1970—October 21, 1972. Some of the data were submitted during the period October 21, 1972—September 30, 1978. Some of the data were submitted after September 30, 1978. After September 30, 1978, EPA considered the research data concerning these chemicals that had been submitted by Stauffer during each of these periods to support me-too pesticide registrations on behalf of other applicants, including PPG Industries, Inc. and Drexel Chemical Company, for pesticies containing butylate and EPTC. These data were used by EPA without Stauffer's consent.

3. Stauffer demanded an arbitration to obtain compensation for the use of its data to support PPG's me-too registrations for butylate. A panel of three arbitrators made an award to Stauffer in this arbitration on June 28, 1983. *In the Matter of the Arbitration Between Stauffer Chemical Company and PPG Industries, Inc.*, AAA Docket No. 16 199 077 82 FIFRA. A copy of the award is attached hereto as Exhibit 2. PPG has acknowledged, and the arbitrators

found that EPA relied on data submitted by Stauffer to support PPG's pesticide registrations for butylate. *See* Findings, 11, 14, 15, 18.

4. Stauffer is aggrieved by EPA's use of its research data to grant pesticide registrations to PPG and other applicants, because it does not have access to a forum that complies with Articles I and III of the Constitution in which to adjudicate the compensation that Stauffer is due under FIFRA. Stauffer is aggrieved by FIFRA's compulsion to resort to an unconstitutional adjudicatory arbitration procedure in order to obtain compensation for the use of its data in support of other companies' registrations. Stauffer is aggrieved by the failure of the arbitrators in the butylate proceeding to award the amount of compensation Stauffer claimed.

5. Stauffer will suffer irreparable harm if its data are used by EPA because it will be compelled to seek compensation under the FIFRA arbitration scheme, which the Court has held to be unconstitutional.

/S/
ANDREW F. FINK

Subscribed and sworn to before me
this 13th day of July, 1984

/s/
Notary Public
LYNNE T. WARGO
Notary Public
My Commission Expires March 31,
1987

BEFORE AN ARBITRATION TRIBUNAL
APPOINTED BY
THE FEDERAL MEDIATION AND CONCILIATION SERVICE

Docket No. PPG Industries, Inc.
16 199 077 82 FIFRA

IN THE MATTER OF ARBITRATION BETWEEN
STAUFFER CHEMICAL COMPANY, CLAIMANT,

and

PPG INDUSTRIES, INC., RESPONDENT

AWARD

This pesticide data dispute is before the Arbitration Tribunal for determination and award after hearings which spanned several months and generated a transcript of more than 2700 pages of testimony and legal argument. Numerous voluminous exhibits were received in evidence in the course of the hearings, most of which have been required to be treated as confidential by the parties and the tribunal under a protective order. Counsel for both parties have ably and exhaustively presented and briefed their respective cases and have provided the Arbitrators with a thorough foundation for their determination and award.

The Arbitrators now make the following findings, conclusions and award.

1. The Arbitrators are empowered and mandated to make an award in this pesticide data dispute by virtue of and in accordance with Sec. 3(c)(1)(D)(ii), which is only one of several data-sharing provisions of the Federal Insecticide, Fungicide and Rodenticide Act As Amended September 30, 1978 ("FIFRA"), 37 USC § 136 *et seq.*, and according to the FIFRA Arbitration Rules of the Federal Mediation and Conciliation Service, 29 CFR Part 1440. According to FIFRA, the findings and determination made by the Arbitrators are final and conclusive, with an opportunity for judicial review restricted only to instances of fraud,

misrepresentation, or misconduct by one of the parties or the arbitrators.[1]

2. An information copy of Judge Wangelin's Memorandum Opinion filed April 10, 1983 and Judgment filed April 12, 1983 in the United States District Court for the Eastern District of Missouri, Eastern Division, in the case of *Monsanto Company* v. *Acting Administrator, United States Environmental Protection Agency*, Civil Action No. 79-366C(1), was received by the Arbitrators from counsel for the parties several days before final argument was heard in this proceeding on April 28, 1983. In the *Monsanto* case, the Court adjudged and decreed that Sections 3(c)(1)(D), 3(c)(2)(A), 10(b) and 10(d) of FIFRA were unconstitutional and unlawful, beyond any power conferred on Congress by Article I, § 8, Clause 3 of the Constitution and in violation of the Fifth Amendment.[2]

3. In any event, counsel for both parties discussed the *Monsanto* decision in their final arguments and recognized it as being contrary to several prior decisions of the same constitutional question by U.S. District Courts in New Jersey, Pennsylvania, Delaware and the District of Columbia, and by the U.S. Court of Appeals for the Third Circuit; *certiorari* was denied by the United States Supreme Court in two separate instances. See the cases cited on the last page of Judge Wangelin's memorandum opinion. Neither counsel expressed any intention to rely on the *Monsanto* case or to

[1] "Misconduct" on the part of arbitrators can include their acting in excess of their powers or "perversely misconstruing the law." *Amicizia Societa Navigazione* v. *Chilean Nitrate Etc.*, 184 F. Supp. 116, affd. 274 F 2d 805.

[2] Parenthetically but interestingly, no court appears to have addressed the question whether other portions of the Constitution, notably Article 1, § 8, Clause *8* ("To promote the progress of . . . the useful arts," i.e., the so-called Patent Clause) and/or Clause *19* (The "Incidental Powers" Clause) of the Constitution have empowered Congress to enact the data-sharing provisions of FIFRA, even if, arguendo, Clause 3 did not. While we do not consider a determination of any such question necessary to our award, we are of the opinion that Article 1, § 8, Clauses 8 and 19 have empowered Congress to enact the Sec. 3(c)(1)(D)(ii) of FIFRA.

question the constitutionality of sec. 3(c)(1)(D)(ii) in this proceeding. On the contrary, both counsel have urged the Arbitrators to proceed with the determination and make an award in the instant case as expeditiously as possible. Thus, in our view, the parties have adopted Sec. 3(c)(1)(D)(ii) as a proper basis for this arbitral determination of their dispute concerning the compensation payable to the claimant under the FIFRA data-sharing provision.[3]

4. While FIFRA is a regulatory statute the primary concern of which is the protection of public health and safety, its purposes in providing for the sharing of data manifestly include the promotion of the development and commercialization of new pesticides as well as the avoidance of wasteful use of scientific manpower in duplicative testing and governmental review thereof. In return for the required sharing of an original submitter's data as part of the regulatory scheme, it provides for the award of compensation to the original data submitter.

5. Subsection (i) of Section 3(c)(1)(D), which was enacted to be only prospectively applicable to pesticides containing active ingredients initially registered after the enactment date of September 30, 1978, is not applicable to this proceeding because Stauffer's original FIFRA registration for "butylate," which is the particular pesticide involved in this dispute was granted in March, 1968. (Tr. 403).[4] In Subsection (i), Congress gave the original data submitter a 10-year period of absolute post-registration exclusivity with respect to the use of his submitted data, and the EPA is prohibited from using the original submitter's data in

[3] Counsel was well aware that such a constitutional question had been raised elsewhere. More than eight weeks prior to the date on which final arguments were heard in this case, counsel representing Stauffer here was attacking the validity of Sec. 3(c)(1)(D)(ii) in the United States District Court for the Southern District in New York in *Union Carbide et al* v. *Anne M. Burford, et al.*, 76 Civ. 2913 (RO).

[4] Stauffer's sales of butylate began in 1968 (Stauffer's Statement of Claim, p. 17) and Stauffer remained the sole distributor of butylate pesticide over a period of 15 years until PPG obtained registration for its butylate pesticide in 1983.

support of an application during this period without the original submitter's written permission.

6. Subsection (ii) of Section 3(c)(1)(D), which is the basis for this proceeding, was also enacted September 30, 1978 but made to apply retroactively to pesticide data originally submitted by an applicant after December 31, 1969 in support of a registration granted before the date of enactment. According to this subsection, the EPA is not allowed to consider the original submitter's data in support of an application of another within 15 years from their original submission unless the other appliant offers to compensate the original submitter for the use of such data. If, as in this case, the parties cannot agree on a proper amount of compensation, the statute provides that such compensation shall be determined by binding arbitration.

7. Under FIFRA, in an effort to conserve resources of the Government and of industry, Congress has chosen to encourage and enable EPA to adopt a generic approach to registration of pesticides, i.e., to focus on the active chemicals themselves, in preference to having to spend its resources on individual registrations of end-use formulations. Sec. 3(c)(1)(D)(ii) allows the test data originally submitted by one manufacturer in support of its application for a pre-1978 registration of a particular pesticidal chemical to be used by the EPA in considering the application of a follow-on manufacturer or formulator seeking a similar registration of the same chemical. However, in the case of data originally submitted after December 31, 1969, and to be used by the EPA within 15 years after their original submission, such use is permitted only on condition that the follow-on registrant offers to compensate the original data submitter for any such use of such data. To generate such data the initial applicant typically must conduct chronic animal feeding tests, environmental chemistry tests, fish and wildlife tests and so forth. Such tests are not only notoriously expensive but also time consuming, and typically require a span of four to five years for completion. By allowing the originally submitted data to be considered by the EPA in support of subsequent applications of other manufacturers seeking registration for the same product

within 15 years from the date of their original submission (the data may be used freely after 15 years), the law encourages the avoidance of wasteful duplication of testing and of the concomitant waste not only of industry's scientific manpower, laboratory animals and other resources but also EPA staff time and resources. As a result, highly skilled personnel as well as other valuable resources can be put to more productive uses. In doing so, the law directly encourages competition and lower pesticide costs to the public, while at the same time it has been designed to encourage research and innovation in the pesticide field by requiring follow-on registrants to pay fair compensation to the original data submitter for the use of his data.

8. The original innovator and test data submitter is expected to have had adequate opportunity to be compensated for his ingenuity, efforts and risk taking in having had a protected head start in marketing his product. Such head start is protected not only by the stated recognition given by FIFRA to his proprietary rights in his test data but usually also by a patent for his novel product and/or its manner of use. After 15 years from an original test data submission, consideration thereof by the EPA in support of an application of another person therefore does not entitle the original submitter to compensation under Sec. 3(c)(1)(D)(ii).

9. Any such compulsory data sharing extends in any event only to test data relevant to public health and safety, e.g. toxicity in use, and not to information concerning the submitter's proprietary manufacturing processes or analytical procedures or the like, all of which remains entitled to protection as a trade secret.

10. The original innovator and data submitter-registrant will in the normal scheme of things spend much effort, time, and expense in inventing a new pesticide, in developing it, in obtaining regulatory approval for it and in promoting and marketing it. Moreover, the burden of regulatory requirements may be substantially greater in the case of the original innovator-registrant than in the case of a subsequent registrant coming along a decade or more after a particular chemical pesticide has proved itself and become accepted in the economy as being safe and effective. In fact, efficacy data were required as a condition for approval of Stauffer's original registration of butylate in this case whereas such efficacy data were waived by the EPA as a matter of general public policy by the time PPG applied for its registration more than a decade later. While in such a case the original submitter may have been, and he was in this case, required to obtain and submit expensive field test data whereas the follow-on registrant was not, the latter clearly is not responsible for any such discrepancy and should not be required to compensate the original submitter for data that are no longer required by the EPA for approval.[5]

11. Stauffer Chemical Co. ("Stauffer"), the claimant, is the originator of "butylate", the novel agricultural herbicide that is involved in this case.[6] Stauffer obtained its first registration for butylate from the U.S. Department of Agriculture[7] in 1968 on an application that was filed in 1966 and was supported by extensive safety and efficacy test data that Stauffer had generated in accordance with the then existing regulatory requirements.

12. In 1978, after enactment of section 3(c)(1)(D)(ii) and some two years after expiration of Stauffer's patent protection, PPG Industries, Inc. ("PPG"), the respondent herein, applied to EPA to have butylate of its own manufacture registered so that PPG could also lawfully make and sell it as a corn herbicide in the United States in competition with Stauffer. In support of its application for registration, PPG relied on the data originally submitted by Stauffer and submitted to Stauffer an offer to compensate the latter for the

[5] After all, if there had been no follow-on registrant at all, the original data submitter would have had to incur the same testing costs regardless and yet not be compensated for any such data except by way of the commercial success that its approved pesticide achieves.

[6] Stauffer obtained its basic United States patent for butylate in 1959. Stauffer's patent protection for butylate accordingly expired in 1976.

[7] USDA was in charge of federal regulation of pesticides before the establishment of the U.S. Environmental Protection Agency ("EPA").

EPA's consideration of Stauffer's data in PPG's application, all in compliance with Sec. 3(c)(1)(D)(ii).

13. The parties made some effort to negotiate compensation, but such efforts soon were abandoned in view of the diametrically extreme positions adopted and rigidly adhered to by the parties. Thereupon, Stauffer initiated this arbitration proceeding in accordance with Sec. 3(c)(1)(D)(ii).

14. PPG, having applied for registration of its butylate herbicide on the basis of test data previously generated by Stauffer, PPG has clearly avoided the expense of having to generate such data independently. In addition, according to substantial evidence produced in this case, PPG has saved some five years of time that it would otherwise have had to spend in generating the required test data on its own and obtaining independent regulatory approval on their basis. Consequently, we find that by invoking the data-sharing provision of Sec. 3(c)(1)(D)(ii), PPG has saved very substantial and identifiable testing costs that Stauffer had previously incurred in generating the test data required in support of its registration, and for which Stauffer is entitled to receive specific compensation. In addition, PPG has also as a result obtained an important economic benefit in being able to start marketing its butylate some five years earlier than it could have without reliance on Stauffer's data. By contrast, Stauffer incurred a corresponding opportunity cost or loss of profits when it had to delay its marketing of butylate until it obtained the required test data and the various label approvals for its butylate herbicide and for its many specific uses and application methods. For this cost avoidance or benefit of early market entry PPG likewise owes Stauffer compensation. However, as we believe that attributing any definite sum to the cost would necessarily have to be based on considerable speculation, we conclude that compensation for this can best and most

reasonably be expressed as a fraction of the sales actually made and to be made by PPG over the next several years.[8]

15. Stauffer could have copyrighted some or all of its labels, but for whatever reason chose not to copyright any. Had the labels been copyrighted, their slavish copying by PPG clearly would have been an infringement of Stauffer's rights under the copyright laws. In the absence of valid copyright protection for Stauffer's labels, their literary text as such is in the public domain for anyone to copy. However, the incorporation of their substance in PPG's own approved labels presupposes EPA's use of the underlying Stauffer data in their approval and entitles Stauffer to compensation for such use within the limits of Sec. 3(c)(1)(D)(ii).

16. To put it differently, where the follow-on registrant deliberately chooses to copy and adopt as his own the substance of an original registrant's approved label[9], the follow-on registrant clearly benefits from the relevant data generated and submitted by the first registrant. In such a case, the follow-on registrant should be required to pay suitable compensation to the original submitter to the extent that the EPA would be expected to consider the original submitter's data as support for the follow-on registration, i.e., for any claim on any label covered by such registration. Whether or not the relevant test data are re-

[8] We decline to award any amount for the so-called "market momentum" factor claimed by Stauffer. Extensive testimony by Stauffer's witnesses sought to project PPG's "market momentum" benefit and hence the value of the Stauffer data used in the process. However, we have found these projections altogether too speculative as a basis for a monetary reward because, inter alia, PPG may not market butylate throughout the projected years for any number of reasons including, for instance, the possibility that a new and superior or more profitable corn herbicide may displace butylate to some extent or even totally.

[9] The term "label", as used in pesticide regulation, includes not only the label proper that is affixed to a container for the pesticide and that customarily discloses its name, composition and some directions for its use, but also includes technical information bulletins and other information made available to purchasers and containing detailed claims as well as directions for use of the product.

quired for label approval under currently prevailing regulations, the EPA should not be expected to approve any new label of a follow-on registrant, and could in proper cases be expected to initiate a cancellation action, if a label claim is significantly inconsistent with any test data previously submitted by another registrant. To this extent then Stauffer's test data would of necessity have had to be at least implicitly considered by the EPA in approving PPG's labels, irrespective of whether such test data were actually required by current regulations. Clearly, in any such case where the follow-on registrant has extensively copied an approved label including claims and instructions generated by a prior registrant, he has economically benefited from the data generated and paid for by the prior registrant and should compensate him for its use. However, when the particular test data are not affirmatively required for approval according to current regulations, economic value of such data to the follow-on registrant is essentially a prospective benefit that cannot be properly measured except in terms of product sales actually made in the future. For this reason, we conclude that Stauffer as the original submitter of such data can most fittingly be compensated for the value of this kind of data not by a lump sum reimbursement of a share of their known original cost or by a lump sum corresponding to an estimate of their eventual economic value, but by a running compensation proportional to the follow-on registrant's actual sales of product.

17. EPA had taken the position that the so-called "citeall" provision with an attendant offer of compensation, as specified in Sec. 3 (c)(1)(D)(ii), was compulsory on all follow on registrants seeking their own registration for a pesticide previously registered by another manufacturer. However, in *National Agricultural Association, Inc. et al* v. *U.S. Environmental Protection Agency*, CA79-2063 (U.S.D.C., D.C., Jan. 20, 1983), the Court has established that a follow-on registrant cannot be compelled against his will to proceed on the basis of the "citeall" data sharing provision. On the contrary, the follow-on registrant was recognized as having the right to elect to apply for and obtain registration on the basis of independently generated test

data of its own as long as such independently generated data meet the then applicable law and regulations. Hence, on one hand, it follows that to achieve the conservation of resources and the promotion of pesticide research and development that Congress intended in enacting FIFRA, the compensation to the original data submitter under Sec. 3(c)(1)(D)(ii) should be no greater than the total costs (including time delay) that the follow-on registrant would have to incur if it elected to base its application on its own tests rather than on reliance of the original submitter's data. On the other hand, however, the compensation should fairly take into account the costs the original data submitter incurred in generating the required test data as well as the benefits obtained by the follow-on registrant in relying on the first registrant's data in support of the follow-on registrant's registration.

18. In the circumstances of this case, we find that the compensation to Stauffer called for by Sec. 3 (c)(1)(D)(ii) for PPG's use of Stauffer's data should reflect a fair share of both the cost of testing required by current regulations and of the "opportunity costs" that PPG avoided not only by avoiding the normal regulatory delay but also by its comprehensive copying of Stauffer's approved labels.

19. In determining proper compensation, one has to consider not only the cost in money and time incurred by Stauffer and avoided by PPG in obtaining the test data submitted to EPA in support of the butylate label approvals that each of the two parties eventually obtained, but also the loss of profit suffered by Stauffer due to regulatory delays and the avoidance of a similar loss by PPG. Though these factors were separately presented by Stauffer, they are interrelated. They are interrelated in that the end product of obtaining all the data required to support all the various label claims and of EPA's consideration of such data and claims, though stretching over a considerable period of time, is the aggregate of all the various approved labels that Stauffer originally obtained and PPG later copied. The record reveals that PPG ultimately appropriated and copied, virtually verbatim, Stauffer's labels for butylate including all uses and all methods of applications to crops de-

veloped by Stauffer. While PPG had the right to do this in view of its offer to compensate Stauffer and in the absence of copyright protection for such labels, having done so and having obtained the economic benefit of Stauffer's labels and the extensive data submitted to support the same, we conclude that PPG cannot be heard to say that no such data are "compensable." On the contrary, we find it fair and proper, and consistent with the language and spirit of Sec. 3(c)(1)(D)(ii), to base an award to Stauffer and against PPG which includes a factor for such opportunity costs.

20. Based on the evidence received, including especially but not limited to Stauffer Exhibits 33 and 36 and related PPG Exhibit 10, as well as Stauffer Exhibit 92 and related PPG Exhibits 21 and 22, and testimony relevant to these, we find the direct aggregate testing cost of required pre-registration data submitted by Stauffer for which it is entitled to receive compensation from PPG under Sec. 3(c)(1)(D)(ii) to be $2,930,000 (in 1983 dollars). In computing this figure, we have excluded the cost of test data submitted before 1970 and not cited later, as well as data from numerous tests that we have found to be substantially duplicative of other submitted data and therefore not required in support of PPG's registration. On the other hand, we have included in our computation pre-1970 test data that were resubmitted after 1969 and were not substantially duplicative of other data submitted.

21. In view of the above, we have determined the sum of $1,465,000 (one half of the sum of $2,930,000 shown in Paragraph 20 above) to represent a fair share of the cost of testing to be paid by PPG to Stauffer for the use of Stauffer's test data in support of PPG's registration.

22. Further, for the opportunity costs avoided by PPG, we hold that Stauffer is entited to receive additional compensation from PPG based on the volume of PPG's eventual sales of butylate. For the purposes of computing and determining this element of compensation, we have accepted the projected total butylate sales figures for the years 1983-1987 as given in Stauffer Exhibit 79, Table 3. Differing to some extent, however, from the PPG market share figures assumed in Table 3, we have assumed that

PPG's market share will be 5% in 1983, 10% in 1984 and 15% not only in 1985 but also in 1986 and 1987. Based on this, we have calculated that PPG's butylate sales in these five years should aggregate approximately 47,250,000 pounds and, based on other data shown in said Table 3, PPG's aggregate profits from these sales should approximate $28,250,000, i.e., about 60 cents per pound, over this five-year period. If PPG's actual sales volume is greater or smaller than projected, its profits should be correspondingly greater or smaller, and its compensation payments to Stauffer should reflect these variations. In any event, we hold Stauffer entitled to receive a share of such PPG profits as part of its compensation.

23. While the figures in Table 3 of Stauffer's Exhibit 79 have lead us to conclude that PPG's profits from its butylate sales should aggregate about $28,250,000 and average about 60 cents per pound in the years 1983 through 1987, this projection is necessarily speculative and its validity may in reality be greatly affected by PPG's future successess and failures in the marketplace. In addition to the speculative nature of the projections for PPG's share of the butylate market, the size of the total butylate market itself may fluctuate considerably over the years due to largely unpredictable factors such as the world market for corn in general, the recently initiated payment-in-kind (PIK) program in particular, the possible advent of a new and better or more cost-effective herbicide, new regulations concerning the use of butylate or alternative herbicides, etc. Such fluctuations could have a potentially large positive or negative effect on PPG's profits and hence on the compensation we consider fairly payable to Stauffer as part of this award. To minimize the effect of such fluctuations, we have determined that in these circumstances a ten-year period is likely to provide a more just and proper basis than a five-year period for the payout of reasonable running compensation based on PPG's actual future sales, provided that the compensation rate is suitably set.

THE COMPENSATION AWARDED

In view of the above, Stauffer is hereby unanimously awarded and held entitled to receive from PPG:

A. A lump sum in the amount of *$1,465,000* (One-Million-Four Hundred and Sixty-Five-Thousand Dollars), which sum PPG shall pay to the American Arbitration Association, for Stauffer's account within 30 (thirty) days from the date when this award or a true copy thereof is mailed by the American Arbitration Association to PPG's attorneys at their address of record; *plus*

B. Running compensation (R) for every pound of butylate manufactured or otherwise acquired by PPG in the United States in the ten calendar years from 1983 through 1992, both inclusive, and not discarded but sold or otherwise transferred by PPG for use by third parties, which R shall be computed according to the formula

$$R = \$0.15/\text{lb.} \times \frac{Y}{I}$$

Wherein Y is the Producer Price Index for Finished Goods published by the U.S. Bureau of Labor Statistics for the month of November preceding the year in which the respective sale or other transfer is made, and wherein I is such Producer Price Index published for November 1982, *with the proviso*, however, that the total number of pounds of butylate on which this compensation R is due in any year after 1987 shall in no event exceed the highest total number of pounds of butylate on which such compensation was due in any of the calendar years 1983 through 1987, both inclusive. PPG shall report in writing to Stauffer concerning all such butylate sales and transfers within thirty (30) days after the end of each calendar quarter falling within the calendar years 1983 through 1992 and enclose with each such report the compensation due, except that the first such report and payment shall only be due on September 1, 1983 and shall cover sales and transfers of butylate made by PPG between December 31, 1982 and July 1, 1983. No compensation shall be due for any butylate acquired by PPG directly or indirectly from Stauffer.

COSTS

(i) The expenses of witnesses for either party shall be paid by the party producing such witnesses.

(ii) The cost of the stenographic record and all transcripts thereof shall be prorated equally between the parties and shall be paid for by the responsible parties directly to the reporting agency, unless the parties have agreed otherwise.

(iii) All proper other expenses of the arbitration, including but not limited to the administrative fee of the AAA, the arbitrators' agreed fees, the costs of providing a hearing room, and required traveling and other expenses of the arbitrators and of AAA representatives, shall be borne equally by the parties and promptly settled. The AAA may temporarily withhold from Stauffer, subject to a suitable later pro-rata reimbursement from PPG, a portion of the award made under (A) above, and use it for promptly settling all such expenses which are proper, including all fees and expenses billed to the AAA in this case within sixty (60) days from the date when this award is officially mailed to the parties.

Respectfully,

/s/
TERRELL C. BIRCH, *Arbitrator*

/s/
PETER H. SMOLKA, *Arbitrator*

/s/
JOHN C. VASSIL, *Arbitrator*

Date: June 28, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

AFFIDAVIT OF CHARLES O. O'BRIEN

CHARLES O. O'BRIEN, being first duly sworn, deposes and says:

1. I am President, Ciba-Geigy Agricultural Division. I have held this position since 1970. As President, I have total business responsibility for the Agricultural Division which includes administration, marketing, production and research and development.

* * *

7. Prior to 1970 Ciba-Geigy submitted research data necessary to obtain pesticide registrations to the U.S. Department of Agriculture ("USDA"). Portions of these data were regarded by Ciba-Geigy as trade secrets under the applicable state law.

* * *

15. All trade secret research data submitted to EPA after December 1970 and prior to October 21, 1972, were similarly submitted with the expectation and belief that their trade secret status would be protected by the agency, as custodian of the data.

* * *

18. After October 21, 1972, Ciba-Geigy continued to submit research materials to EPA in support of applications for the registration of pesticide chemicals. Ciba-Geigy submitted such materials in reliance upon the trade secrecy law, which continued to be recognized and applied by the federal government, with the expectation that research data submitted by Ciba-Geigy which were trade secrets would not be publicly disclosed by EPA or used by the agency to support registration applications by competitors of Ciba-Geigy.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC. ET AL., PLAINTIFFS,

v.

DOUGLAS M. COSTLE, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL., DEFENDANTS.

AFFIDAVIT OF DONALD E. ROSEN

DONALD E. ROSEN, being first duly sworn, deposes and says that:

1. He has been employed by plaintiff E. I. du Pont de Nemours and Company (hereinafter "Du Pont") since 1947 and since 1955 has been assigned to work dealing with the government registration of pesticides to be sold by Du Pont.

2. In December 1979, in his capacity as an employee of Du Pont, he compiled an "INDEX OF TRADE SECRET DATA SUBMITTED TO EPA (Through September 30, 1978)" with respect to each of the primary pesticide active ingredients which were included in products then sold by Du Pont and one copy of each such Index is attached hereto.

3. To his knowledge and belief each of the attached Indexes represents an accurate reference to data considered to be trade secrets of Du Pont which had been submitted to the United States Environmental Protection Agency (or its predecessor) on or before September 30, 1978 with respect to each specified pesticide ingredient.

/S/ _____
DONALD E. ROSEN

Subscribed and sworn to before me this 11th day of May, 1981.

/S/ _____
OLIVIA J. NICKLE
Notary Public

My Commission Expires: Nov. 14, 1982

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS,

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

JOHN E. DAVIES, being first duly sworn, deposes and says:

1. My name is Mr. John E. Davies and I am Vice President and General Manager, Agrochemical Division of Rhone-Poulenc Chemical Company ("Rhone-Poulenc"). In my capacity as General Manager, I am responsible for all activities of the Agrochemical Division of Rhone-Poulenc in the United States. My responsibilities include overseeing the research and development, manufacturing, marketing and sales departments of the Agrochemical Division.

* * *

11. Trade secret research data and information have been routinely submitted to the EPA and its predecessors the Food and Drug Administration ("FDA") and the United States Department of Agriculture ("USDA") since 1947 for the purpose of supporting product registrations and petitions for tolerances under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). These data have been submitted with non-trade secret data in integrated packages because segregating the information would take considerable time and effort.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

AFFIDAVIT OF DONALD S. MacIVER

DONALD S. MACIVER, being first duly sworn, deposes and says:

1. I am Vice President and Assistant General Manager of the Agricultural Chemical Division of Stauffer Chemical Company, a position I have held since 1978.

* * *

8. Since approximately 1955, Stauffer has submitted and continues to submit the results of its pesticide research to the federal agencies to support the registration of pesticide chemicals under the Federal Insecticide, Fungicide and Rodenticide Act and to obtain residue tolerances under the Federal Food, Drug and Cosmetic Act.

9. Stauffer is the primary developer of research data on the 17 pesticide active ingredients listed in APPENDIX 1. To support pesticide registrations and to obtain tolerances for products containing these active ingredients, Stauffer has submitted to the government the following types of trade secret research data:

(a) *General Chemistry Data*—Data concerning the composition of the technical grade chemical which functions as the active ingredient of a pesticide product and data concerning the composition of the formulated product. These data specifically include:

— analytical methods for the active ingredient and impurities;

— assays of the technical-grade chemical and impurities;

— analyses of the technical-grade chemical, including the active ingredient and impurities;

— description of manufacturing processes for the technical-grade chemical;

— chronic/oncogenic studies (18 to 30 months of dosing) in two rodent species;

— multiple generation reproduction studies in rodents;

— teratogenicity studies in one or more mammalian species.

(e) *Efficacy and Phytotoxicity Data*—Detailed data on the use of pesticides on the target pest and target crop as follows:

— filed test results using various rates, application methods, formulation tank mixes, etc. to establish the most beneficial use parameters from both a pest control and crop tolerance viewpoint;

— comparative studies with other commercial development candidates.

* * *

13. Trade secret properties were protected by USDA in its policy and practice. It was Stauffer's understanding that these trade secret protections prevented USDA, as custodian of the data, from disclosing trade secret research data without express authorization from Stauffer. After December 1970 and prior to October 21, 1972, all trade secret research data submitted to EPA were similarly submitted with the expectation and belief that their trade secret status would be protected by the Agency, as custodian of the data.

14. On October 21, 1972, amendments to FIFRA became effective. My understanding of the law as amended was that our state law trade secrecy rights were not changed by the amendments and were provided continued protection. Under the amendments, research data which constituted trade secrets could not be disclosed by EPA without Stauffer's authorization.

15. After October 21, 1972, Stauffer continued to believe and expect that all trade secret research materials submitted to EPA and the Department of Agriculture prior to October 21, 1972, would be maintained as trade secrets by

EPA and not be publicly released or relied upon by EPA to support the pesticide registration application of a competitor of Stauffer.

16. After October 21, 1972, Stauffer relying upon its belief and expectation that trade secret research data submitted by Stauffer to the government would not be publicly disclosed by EPA or used for the benefit of its competitors, continued to submit research materials to EPA in support of applications for the registration of pesticide chemicals.

17. Relying upon the trade secret status of its submissions to the USDA and the EPA, Stauffer furnished these agencies with more information than the minimum necessary to obtain or maintain its registrations. For example, when conducting field tests a researcher would ordinarily test and report on a large number of different chemical compounds and different dose rates. Although only a small portion of the report would pertain to the registration in question, the entire report would be submitted to the USDA, and later the EPA, in reliance upon the agency's protection of trade secret information. Similarly, as a general practice, Stauffer would conduct more research than required by the federal agency to obtain a registration. In the interest of full disclosure and in reliance upon the agency's protection of trade secret information Stauffer would submit the additional information to the agency.

18. Stauffer submitted data to the government freely with the expectation that USDA and EPA would protect the trade secret status of Stauffer's data. Stauffer would not have submitted all of these data to the government if trade secret protection had not been available.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 2913 (RO)
AFFIDAVIT

UNION CARBIDE AGRICULTURAL PRODUCTS COMPANY, INC., ET AL., PLAINTIFFS

against

ANNE M. GORSUCH, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS.

ROBERT C. BROWN, being first duly sworn, deposes and says:

1. My name is Robert C. Brown and I am Group Patent Counsel for Union Carbide Corporation. I am responsible for the patent activities of Union Carbide's Polyolefins Division and its wholly owned subsidiary company Union Carbide Agricultural Products Company, Inc. ("Union Carbide"). Since 1969, I have been responsible for all patent matters at Union Carbide relating to agricultural chemicals including prosecution of applications, licensing matters and litigation.

* * *

I. Types of Trade Secret Data

3. Since the enactment of FIFRA in 1947, Union Carbide has submitted research data to the federal government to support tolerance petitions and applications for the registration of various pesticide products. The general types of research data required by the Environmental Protection Agency ("EPA") and its predecessors have included the following: general chemistry data, efficacy data, human hazard and environmental safety data, metabolism data, environmental chemistry data and manufacturing and process formulation data.

4. Portions of the data submitted to the EPA by Union Carbide under FIFRA are considered company trade secrets if they fit the following criteria: (1) the data were developed or acquired by Union Carbide, (2) the data have not been published or made available to persons outside

Union Carbide and (3) the data bestow a competitive advantage to Union Carbide. The following description of the general types of data Union Carbide has submitted to EPA and its predecessors since 1947 identifies the portions of the data considered trade secret by Union Carbide and the portions that are not regarded as trade secret. I have not included a description of general chemistry data, which are protected as trade secret under the 1978 amendments to FIFRA and are not at issue in this lawsuit.

* * *

Supreme Court of the United States

No. 84-497

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS CO., ET AL.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

November 26, 1984

Justice O'Connor took no part in the consideration or decision of this case.